1962

Garkane Power Association, Inc. v. Western Drilling Company et al : Brief of American Casualty Company, A Pennsylvania Corporation, Defendant and Respondent

Utah Supreme Court

IN THE SUPREME COURT
of the
STATE OF UTAH

GARKANE POWER ASSOCIATION, INC., A Utah Corporation,
Plaintiff and Appellant,
vs.
WESTERN DRILLING COMPANY, a Utah Corporation, JOSEPH BASSICK, EMILY BASSICK, UTILITIES SERVICE COMPANY, AMERICAN CASUALTY COMPANY, a Pennsylvania Corporation and RICHFIELD COMMERCIAL AND SAVINGS BANK, A Utah Corporation,
Defendants and Respondents,
and
RICHFIELD COMMERCIAL SAVINGS BANK, a Utah Corporation,
Third-Party Plaintiff and Appellant,
vs.
RICHARD T. CARDALL, THOMAS P. VUYK, WESTON L. BAYLES and MERRILL K. DAVIS,
Third-Party Defendants and Respondents.

Case No. 9620 and No. 9621

BRIEF OF AMERICAN CASUALTY COMPANY, A PENNSYLVANIA CORPORATION, DEFENDANT AND RESPONDENT.

Appeal from an Order of the District Court of Salt Lake County, Utah, Honorable A. H. Ellett, Judge

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Appeal from an Order of the District Court of Salt Lake County, Utah, Honorable A. H. Ellett, Judge

NATURE OF THE CASE

The plaintiff brought this action to recover $11,010.69 paid out of its trust account by defendant Richfield Commercial and Savings Bank, under a

judgment and garnishment proceeding and an execution based thereon, which judgment was thereafter set aside for lack of jurisdiction, or, plaintiff sought in the alternative to have payment of said sum declared a valid offset against the amounts owed by the plaintiff to the defendant, American Casualty Company, as assignee of defendants Joseph Bassick, Emily Bassick and Utilities Service Company, defendants.

DISPOSITION IN LOWER COURT

The District Court of Salt Lake County, Utah, dismissed plaintiff's Amended Complaint against defendant Richfield Commercial and Savings Bank, and denied plaintiff's Motion for Summary Judgment against the defendant American Casualty Company, assignee of defendant, in the original proceedings.

RELIEF SOUGHT ON APPEAL

The plaintiff seeks a reversal of the order dismissing plaintiff's Amended Complaint as against defendant Richfield Commercial and Savings Bank, or, in the alternative, reversal of the order denying plaintiff's Motion for Summary Judgment against defendant American Casualty Company.

Defendant American Casualty Company seeks to have this Court sustain the lower court's order denying plaintiff's Motion for Summary Judgment as against it.

STATEMENT OF FACTS

To avoid needless repetition, defendant and respondent American Casualty Company will consolidate its answer to the brief of the Garkane Power Association, Inc., Plaintiff and Appellant, and insofar as this defendant deems necessary, answer the brief of Richfield Commercial and Savings Bank, Third-Party plaintiff and appellant, in this brief.

Both the plaintiff and the third-party plaintiff as appellants have rather thoroughly set forth in their statements of fact, the circumstances out of which this litigation arose. Except as modified or expanded for purposes of argument and to make the presentation of this defendant's argument more meaningful, the statements of facts as set forth in those briefs, will be adopted.

The underlying judgment upon which a portion of this litigation arose is founded upon a judgment entered by the District Court of Salt Lake Coutny, Utah, in Civil Action No. 109123, which judgment was entered May 21, 1957, by default for $50,000.00 and costs of $13.60 in favor of Western Drilling Company and against Joseph Bassick, Danny P. Bassick, M. M. Bassick, Martin R. Bassick and Nicholas Bassick, as individuals and Joseph Bassick, Danny P. Bassick, M. M. Bassick, Martin R. Bassick and Nicholas Bassick d/b/a Utilities

Construction Company and Utilities Service Co. (File No. 109123).

A sheriff's return dated June 25, 1956, states in part as follows:

> "STATE OF UTAH
> COUNTY OF SALT LAKE } ss.
> Sheriff's Office:
>
> I hereby certify and return that I received the within and hereto annexed summons on the 25th day of June, 1956, and served the same upon M. M. Bassick, the within named defendant, personally, by delivering to and leaving with said defendant, in Salt Lake County, State of Utah, a true copy of said summons, on the 25th day of June, 1956."

Upon this return of summons a default certificate was executed on the 21st day of May, 1957, against all of the named defendants, and judgment was entered against them for the sum of $50,000.00 plus $13.60 on the same day. (See File No. 109123, unnumbered.)

It was upon this underlying judgment that the subsequent writ of garnishment was issued and other garnishment proceedings which are under review here were based.

The chronological order of the various subsequent proceedings are outlined in appellant Garkane Power Association, Inc.'s brief at pages 3 through 6. No oral testimony has been presented to the trial court.

STATEMENT OF POINTS

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT AMERICAN CASUALTY COMPANY.

POINT II.

THE GARNISHMENT AND EXECUTION, BEING BASED UPON A VOID UNDERLYING JUDGMENT ARE LEGAL NULLITIES WHICH CAN CREATE NO LEGAL RIGHTS IN ANY PARTY CLAIMING THEREUNDER.

(a) THE SERVICE OF PROCESS UPON M. M. BASSICK WAS INSUFFICIENT TO ACQUIRE JURISDICTION OVER ANY OTHER DEFENDANT AND THE JUDGMENT AGAINST SUCH OTHER DEFENDANTS ON THE BASIS OF SUCH SERVICE WAS AND IS VOID.

(b) RULE 60 (b) U.R.C.P. DOES NOT PREVENT THE TRIAL COURT FROM SETTING ASIDE A JUDGMENT VOID FOR WANT OF JURISDICTION.

(c) THE GARNISHMENT PROCEEDINGS BEING BASED UPON A VOID JUDGMENT ARE ALSO VOID.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT AMERICAN CASUALTY COMPANY.

Plaintiff's Motion for Summary Judgment against defendant and respondent American Casualty Company was filed November 24, 1961, and denied January 2, 1962. No oral testimony, deposi-

tions or affidavits were presented to the Court in support of this Motion. Therefore, the trial court was left to rule upon the motion solely on the pleadings.

Rule 56, Utah Rules of Civil Procedure, provides that on a Motion for Summary Judgment,

> ". . . the judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

Even a cursory review of the pleadings will demonstrate that numerous questions remain at issue between the plaintiff and this defendant.

The plaintiff alleged in Paragraph 6 of his Amended Complaint that on March 27, 1960 it answered a writ of garnishment as follows:

> "Construction contract not received final approval. The final amount due Utilities Service Co. has not been determined from the records available. Now about $11,010.69." (Tr. 2)

In its Answer, defendant American Casualty Company alleged that at the time plaintiff answered the garnishment interrogatories there was no money due and owing Joseph Bassick, dba Utilities Service Company (Tr. 33). This material issue in the case remains as an unsupported allegation and an unqualified denial. Its determination must be left to a trial of the case.

As an affirmative defense defendant American Casualty Company alleged that when plaintiff Garkane Power Association filed its answers to the garnishment interrogatories, there was no money due and owing by plaintiff to Joseph Bassick, dba Utilities Service Company, and further, that payment of any money to Western Drilling Company, at the time of the payment by the defendant Richfield Commercial and Savings Bank, was not payment of any moneys that became due and owing to Joseph Bassick and Utilities Service Company because of the prior assignment from Bassick, and Utilities Service Company to the American Casualty Company of any money that was or might become due from Garkane Power Association. The said assignment was received, acknowledged and known by the Garkane Power Association in July 1960, prior to the execution upon the Richfield Bank in November of 1960 (T. 33).

In its reply to the counterclaim of American Casualty Company, Garkane Power Company alleges that it did not know of the assignment to American Casualty Company until approximately November 29, 1960. This defendant alleged that plaintiff knew or should have known of the assignment prior thereto (T. 33, 35). Such presents an issue of fact which also must await trial for determination. Further, American Casualty Company alleges

in its answer that any moneys paid by Richfield Commercial and Savings Bank to Western Drilling Company, pursuant to the terms of the garnishment was money due American Casualty Company (T. 33A). The bank held certain funds in the account of Garkane Power Association, Inc. The garnishment execution did not issue to the Bank, but to the Garkane Power Association, Inc. If funds were paid out improperly by the Bank, such is a matter to be adjusted between the Bank and Garkane, and the American Casualty Company should not be held responsible for a voluntary payment by the Bank to Western Drilling Company. Therefore this Defendant alleged that Garkane Power Association must look to the Bank for any damages it has suffered by reason of the wrongful payment, and not to American Casualty Company. This matter must also await determination.

In addition, American Casualty Company alleged in its answer that the underlying judgment between Western Drilling Company and Utilities Service Company, entered May 21, 1957, and the garnishment proceedings based thereon were false, fraudulent and void. The American Casualty Company is entitled to present its evidence in support of this allegation.

Further, in its Reply to the Counterclaim of American Casualty Company, Garkane Power Association alleges affirmatively that the American Cas-

ualty Company knew of the garnishment proceedings as referred to in plaintiff's Amended Complaint, but failed to intervene in said proceedings (Tr. 35). This allegation of fact is unsupported by any evidence and thus cannot be rulled up as a matter of law.

All of the foregoing issues appear as bare allegations and there is no basis upon which the court could properly grant the plaintiff's Motion for Summary Judgment against this defendant. There are genuine material issues of fact which must await completion of further discovery procedures or a development of the allegations upon a trial of the case. The trial court properly denied plaintiff's Motion for Summary Judgment. The plaintiff's lack of conviction in the merits of its appeal on this issue is demonstrated by the fact that its brief is devoid of any argument in support of the alleged erroneous ruling.

> "A summary judgment must be supported by evidence, admissions and inferences which when viewed in the light most favorable to the loser shows that, 'there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law'. Such showing must preclude all reasonable possibility that the loser could, if given a trial, produce evidence which would reasonably sustain a judgment in his favor."
>
> *Bullock* v. *Deseret Dodge Truck Center, Inc.*, 11 Utah 2d 1, 354 P. 2d, 559, 661. See also

D.A.V. vs. *Hendrixson*, 9 Utah 2d 152, 340 P. 2d 416; *In Re Williams' Estates*, 10 Utah 2d 83, 348 P. 2d 683, 685.

In the recent case of *Brandt* vs. *Springville Banking Company*, 10 Utah 2d 350, 353 P. 2d 460, this court observed that since a summary judgment prevents the litigants from fully presenting their case to the court, courts are and should be reluctant to invoke this remedy.

In any event, the alleged conditions of liability of this defendant have not been fulfilled and therefore Plaintiff was not entitled to judgment under any circumstances.

Based upon the law and the facts present in this case, it is submitted that the court properly denied plaintiff's Motion for Summary Judgment against this defendant.

POINT II.

THE GARNISHMENT AND EXECUTION, BEING BASED UPON A VOID UNDERLYING JUDGMENT ARE LEGAL NULLITIES WHICH CAN CREATE NO LEGAL RIGHTS IN ANY PARTY CLAIMING THEREUNDER.

Plaintiff alleges under Point II of its brief that the garnishment and execution were of no force or effect because they were based upon a void underlying judgment; namely, *Western Drilling Company, Plaintiff* vs. *Joseph Bassick, et al., Defendants*, Civil Case No. 109123 (p. 8). This defendant supports appellant's statement of the law as it ap-

plies to this case and concurs in the reasoning and the numerous authority cited in support thereof. Richfield Commercial and Savings Bank, Respondent and Appellant denies the invalidity of the judgment (Point I, Brief of Richfield Commercial and Savings Bank. Appellant-Respondent, p. 8). Respondent American Casualty Company will be directly affected by a ruling on this question. Plaintiff and Appellant seeks recovery of $11,010.69 from Richfield Commercial and Savings Bank, or "in the alternative and in the event judgment against defendant Western Drilling Company cannot be obtained and satisfied, then for a determination that the amount so paid Western Drilling Company is a valid and legal setoff against any amounts owed by plaintiff (and Appellant) to Joseph Bassick and Emily Bassick or American Casualty Company" under an assignment (T. 4). The Richfield Commercial and Savings Bank contends that the underlying judgment created legal rights in it sufficient to protect it from liability in paying $11,010.69 to Western Drilling Company under a garnishment execution. If this position is sustained, Plaintiff Garkane Power Association, Inc. will be denied recovery on its Amended Complaint against the Bank and Defendant American Casualty Company may be affected on its counterclaim. Therefore, this defendant deems it necessary to supplement the discussion of

the law as contained in Point II of Plaintiff and Appellant's Brief, Garkane Power Association, Inc., and to state its position with additional authority, and to reply to certain allegations contained in the Brief of Richfield Commercial and Savings Bank as Third-Party Plaintiff, Appellant-Respondent.

(a) THE SERVICE OF PROCESS UPON M. M. BASSICK WAS INSUFFICIENT TO ACQUIRE JURISDICTION OVER ANY OTHER DEFENDANT AND THE JUDGMENT AGAINST SUCH OTHER DEFENDANTS ON THE BASIS OF SUCH SERVICE WAS AND IS VOID.

As previously noted, the default judgment in Civil Action 109123 was based upon a service of process made only upon M. M. Bassick, individually. Service of process was never made upon Utilities Service Company or any of the other named defendants. (Return of Summons, File No. 109123).

The law is clear that service of process upon an individual, without more being indicated by the return of summons, is insufficient to give the court personal jurisdiction over a partnership or association of which the individual may be a member. The caption of the complaint in Civil Action 109123 is of particular significance. Western Drilling Company is named as a plaintiff. Five individuals are designated as individual defendants, and then the same individuals are identified as a business association known as the Utilities Construction

Company and Utilities Service Company (See File No. 109123). The "Return of Summons" indicates that only one summons was served upon M. M. Bassick, and that as an individual. The plaintiff, by identifying each defendant in two capacities, as an individual and as a business association, plainly indicated its intention to sue each in two capacities. This intention is confirmed by the allegation contained in paragraph 2 of the complaint which reads as follows:

> "Defendants are all brothers and have been associated in various joint ventures individually and for themselves and also under the fictitious name of Utilities Construction Company and the Utilities Service Company of Idaho and Utah."

A partnership is not alleged, even if intended, and authority to receive service of summons on behalf of the association, even had one been served upon M. M. Bassick in his alleged association capacity, cannot be presumed. The trial court did not acquire jurisdiction over the other individual defendants or over the association and the trial court properly set the judgment aside by quashing the Summons on Return as to all defendants except M. M. Bassick, individually.

This court has held that an association of individuals doing business together in a common name is an artificial person having separate legal exist-

ance and an execution issued on a judgment running against the association only is absolutely void insofar as it purports to be against the individuals. *Hamner* vs. *Ballentyne*, 16 Utah 436, 52 P. 770. Similarly, a judgment against an individual, founded upon personal service as to him, is not sufficient to base a judgment against an artificial person having separate *legal* existence, and of which he happens to be a member. Although Rule 17 (d) U.R.C.P. provides that associates may be sued by their common name, "and any judgment obtained against the defendant in such case (association) shall bind the property of all the associates in the same manner as if all had been named defendants . . .", this does not relieve the plaintiff of first acquiring jurisdiction over the association, as a separate legal entity, by service of process. Rule 4 (e) (4), U.R.C.P. specifies the precise manner in which *personal service* must be obtained where an unincorporated association is involved.

A copy of the summons must be delivered to:

> ". . . an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant. If no such officer or agent can be found in the county in which the action is brought, then upon any such officer or agent, or any clerk, cashier, managing agent, chief

clerk, or other agent having the management, direction or control of any property of such corporation, partnership or other unincorporated association within the State. If no such officer or agent can be found in the state, and the defendant has, or advertises or holds itself out as having, an office or place of business in this state, or does business in this state, then upon the person doing such business or in charge of such office or place of business."

As will appear from the authorities hereafter cited, the Return on Summons, as required by Rule 4(g) U.R.C.P., must specify the person upon whom service was made and his capacity. 72 C.J.S. p. 1131.

A review of the Return on Summons in the instant case clearly indicates that the alleged association was not served with process and the Court did not acquire jurisdiction over it.

The case of *Prows* vs. *Hawley*, 72 Utah 444, 448, 271 P. 31, lends assistance in the matter before the court. There, the plaintiff brought suit against three individuals, whom he alleged in the caption of his complaint to be doing business under the partnership name of Hawley, Anderson and Hinckley. Judgment was obtained against the three as individuals. On appeal, the defendants claimed that the action attempted to be stated was one against the partnership, or the defendants based on a partnership relation, and in such case it was necessary to allege in the body of the complaint the existence

of the partnership. In this connection the court stated:

> "The only reference made in the complaint to a partnership is in the caption, 'J. C. Hawley, O. A. Anderson, and I. N. Hinckley, doing business under the partnership name of Hawley, Anderson and Hinckley, defendants.' Notwithstanding such recitals in the caption, the action, nevertheless, is one only against the defendants individually. *Guthiel* vs. *Gilmer*, 27 Utah 496, 76 P. 628; *Maclay Company* vs. *Meads*, 14 Cal. App. 363, 112 P. 195, 113 P. 364. As stated in the last-cited case, such words in the caption 'do not and cannot make the partnership a party defendant in the action. The words referred to are merely descriptive — that is, they do no more than unnecessarily describe or identify the particular persons proceeded against, in their individual capacities, whatever may have been the intention of the pleader in using them.'
>
> "Upon such a complaint, no judgment properly could have been taken against the partnership. This action must thus be regarded as one against the defendants in their individual capacities only . . ."

Nowhere is it alleged in the body of the complaint, in Civil Case No. 10913, that the individual parties were a partnership. In fact M. M. Bassick, the only individual upon whom service was made, is identified in pargraph 4 of the complaint as an employee of plaintiff. The complaint does not allege a partnership, but Richfield Commercial and Savings Bank assumes it and seeks to apply rules per-

taining thereto. (Brief p. 11). However Section 48-1-3, U.C.A. (1953) provides that "any association formed under any other statute of this state . . . is not a partnership under this chapter, . . ." A presumption of partnership cannot aid the Bank's position here. The court did not acquire jurisdiction over the association, even were it properly made a party to the action. To the same effect see *Ferry* vs. *North Pacific Stages, et al,* 296 P. 679 (Cal.)

This rule is plainly stated in 68 C.J.S. Partnership, § 209, Page 683:

> "An action against certain named individuals as partners doing business under a certain firm name is an action against them as individuals, and is not an action against the partnership as a separate entity."

The annotator in 72 C.J.S. Process, § 94 (b), Page 1131, reviews the law as follows:

> "In the case of two or more defendants a return of process should show clearly on which ones service was made, and when and how it was made on each; and a return showing service on one, but silent as to another, is not sufficient to show that service was had on such other."

The Sheriff's Return in the instant case, clearly shows that M. M. Bassick was served as an individual only and the judgment which was entered in excess of this acquired jurisdiction was absolutely void and was properly set aside upon direct attack by a Motion to Quash Service of Summons.

(b) RULE 60 (b) U.R.C.P. DOES NOT PREVENT THE TRIAL COURT FROM SETTING ASIDE A JUDGMENT VOID FOR WANT OF JURISDICTION.

Respondent, Richfield Commercial and Savings Bank, at Page 9 of its brief, argues that Rule 60(b), U.R.C.P. requires that relief sought from a final judgment must be applied for within three months after the judgment is entered or taken, and that since the Motion to Quash Service of Summons in Civil Case No. 109123, and the judge's order granting that Motion occurred more than three years following the entry of judgment, that the court lacked jurisdiction to hear the motion. The rule has reference to the procedure of setting aside a default judgment where the defendant "has not been personally served" but the court has acquired a color of jurisdiction, and not to those cases where there is a total absence of it. A rule similar to Rule 60(b) U.R.C.P. has been established in Utah since 1888, and was considered by this court in the case of *Blyth and Fargo Company* vs. *Swenson*, 15 Utah 345, 349, 352, 353, 49 P. 1027.

The construction of Section 3256 Comp. Laws of Utah 1888, which is substantially equivalent to our present Rule 60 (b) U.R.C.P. was involved. That section permitted the court to relieve a party from a final judgment taken against him for mistake, inadvertence, surprise or excusable neglect. A part of the section stated as follows:

"When for any cause the summons in an action has not been personally served on the defendant, the court may allow on such terms as may be just, such defendant or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer the merits of the original action."

A default judgment was entered against Swenson even though no service of process had been made upon him, and he had not appeared in the action. In setting aside the judgment as to him the court concluded:

"A judgment against a party not served with process, who did not appear in person or by his attorney, is without any binding effect; and though the process against him may have been returned as served, or the record may show his appearance, if in fact he was not served, and did not enter his appearance or authorize it to be done, he may, upon learning of the judgment, move the court to set it aside, and upon sufficient proof the court should grant the motion. A judgment in such a case, without the service of process or appearance, would not be due process of law, under the constitution of this state or the constitution of the United States. And the sale of the defendant's property by virtue of an execution issued upon such a judgment, if sustained, would deprive him of his property without due process of law. A judgment appearing from the record to have been entered against a defendant without service of process or appearance is void on its face, *and may be set aside at any time by the court.*

It is absolutely void." (Emphasis added)

The court after reviewing the facts held that the one year limitation did not apply when a judgment "is entered against a defendant without notice or appearance".

> "But we are of the opinion that the defendant against whom a judgment may have been rendered without service of process or appearance may, upon learning of it after the expiration of the year, make his motion to set it aside and that the court should grant him leave to answer. And if the motion in such case is made before the expiration of the year, and the hearing is deferred until afterwards, the court should hear and decide the motion. Though a defendant should be first informed of a judgment so obtained years after its rendition, by the levy of an execution on his property, he would have the right to move the court to set it aside, and to ask for leave to plead or answer, and upon sufficient proof it would be the duty of the court to grant such a motion and leave. A party must be given an opportunity to be heard before judgment in a case to which he is a party, if he so desires. He is entitled to his day in court." (Citing cases).

The court continued and quoted with approval from the case of *Great West Mining Co.* vs. *Woodmas of Alston Mining Co.*, 12 Colo. 46:

> "It follows as a logical result of the propositions before discussed, that a judgment rendered without service . . . is . . . void and that all sales or other proceedings had there-

> under, are, as to all persons, irrespective of motives or *bona fides*, absolute nullities. A different rule might prevail if a judgment is only attacked upon the ground of fraud, and rights have been acquired on execution sales without notice of such fraud. But absence of legal notice or authorized appearance is jurisdictional. Without jurisdiction, no judgment whatever will be entered, nor rights acquired thereunder."

The court cited other authorities with approval indicating that where judgments had been irregularly entered because of lack of jurisdiction, the court had power to entertain and set them aside even though not made within the time specified by statute.

Rule 60(b) U.R.C.P. does not restrict the inherent power of the court to set aside judgments entered without jurisdiction. A void judgment acquires no sanctity by the mere passage of time. The underlying judgment was properly set aside as being void.

In *Griener* vs. *Ogden Street Railway Company*, 21 Utah 158, 60 P. 548, this court sustained the trial court's action of setting aside and quashing the return of summons as to one of the defendants because of improper service. The court held that a judgment based upon such improper service "is of no effect" and is "utterly void." See also *Boston Acme Mines Development Company* vs. *Clawson*, 66 Utah 103, 240 P. 165, which held a Motion to Quash a proper direct attack upon a void judgment.

(c) THE GARNISHMENT PROCEEDINGS BEING BASED UPON A VOID JUDGMENT ARE ALSO VOID.

Other courts which have considered the precise question before this court have determined that a garnishment proceeding, based upon a void underlying judgment, is also void. Typical of these cases is *Ludvickson* vs. *Severy State Bank*, 105 Kas. 225, 182 P. 396. There an action was instituted against the bank for paying certain sums pursuant to a garnishee judgment which was founded upon a void judgment. The following language is taken from the opinion of the court:

> "The justice of the peace was without jurisdiction of the defendants in the action before him; summons and garnishment was issued in violation of law; and the proceedings thereon are void. Payment under a void garnishment "proceeding is no defense (citing authority). Any judgment rendered or other action taken by a court without jurisdiction is a nullity and open to attack collaterly as well as directly."

See also *Egnatik* vs. *Riverview State Bank of Kansas City*, 114 Kas. 105, 216 P. 1100, and *McPhee* vs. *Gomer*, 6. Co. A. 461, 41 P. 836, to the same effect.

In the case of *Lincoln-Mercury-Phoenix, Inc.* vs. *Base*, 84 Ariz. 9, 322 P. 2d 891, the validity of an execution rendered on a void judgment was involved. The appellant was the plaintiff in the action below and sued the defendant on an outstanding

debt. A private process server was appointed under the Arizona Rules of Civil Procedure, and a return of service was filed wherein it was stated that the defendant was personally served. The defendant made no appearance and a default judgment was entered which gave rise to an execution and sheriff's sale of defendant's property. The defendant filed a Motion in the same cause to set aside the sale and for a restraining order, and in support thereof filed an affidavit stating that she was out of the State of Arizona at the time process was served, and that the lady upon whom process was served was not her agent, and had not given her notice of the summons. The trial court found that the defendant was never properly served with summons and complaint and consequently ordered the sheriff's sale of her property declared null and void.

On appeal the trial court was affirmed:

> "The judgment being void, the execution issued thereon was void, and the title to the lands could not pass to the plaintiff. The general rule is that an execution may not issue upon a void judgment; an execution so issued is itself absolutely void, and such invalidity extends to acts performed thereunder. Accordingly, title does not pass to a purchaser at an execution sale where the judgment supporting it is void."

It is submitted in the instant case that jurisdiction was not obtained over the Utilities Service Company or any other defendant except M. M.

Bassick, individually, and that the default judgment rendered against it was absolutely void. Therefore, no rights were acquired by the Bank in relying upon a garnishee execution based thereon. In any event the garnishee execution was not directed to the Bank, but to Garkane Power Association, Inc., and the payment by the Bank to Western Drilling Company was voluntary.

CONCLUSION

It is respectfully submitted that the trial court did not err in denying Plaintiff's motion for summary judgment, because material issues of fact remain undetermined, and in any event, the admitted conditions of liability of this Defendant and Respondent, have not been fulfilled. Further, the underlying judgment is void for lack of service of process and any garnishment proceedings based thereon are void and therefore legal nullities.

Respectfully submitted,

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